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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE BOARD ORDER TO SHOW CAUSE RE: POTENTIAL PATTERN OF VIOLATIONS, INCLUDING NOTICES OF VIOLATION NOS. N91-35-1-1 AND N91-26-7-2(#2), CO-OP MINING COMPANY, BEAR CANYON MINE, ACT/015/025, EMERY COUNTY, UTAH	**REQUEST FOR RECONSIDERATION** DOCKET NO. 92-041 CAUSE NO. ACT/015/025

Co-op Mining Company (Co-op) respectfully requests that the Board reconsider its February 4, 1993 Order ruling that Co-op is collaterally estopped from introducing evidence as to the degree of fault giving rise to NOV N91-35-1-1 and NOV N91-26-7-2(#2) in the Pattern of Violation hearing presently before the Board. This Request is based on the following grounds:

1. Collateral estoppel does not apply to uncontested NOVs.
2. Collateral estoppel does not apply where the burden of proof in the second proceeding shifts in the proponent's favor.
3. Collateral estoppel does not apply where the potential penalty to the proponent in the second proceeding substantially increases.
4. Applying collateral estoppel to the underlying facts of a violation in "Pattern of Violation" hearings is against the Board's Rules, the Division's own policy and practices, and public policy.

This Request for Reconsideration is supported by the points and authorities set forth below.

STATEMENT OF FACTS

On February 27, 1991, the Division issued N91-35-1-1 to Co-op , alleging that Co-op had constructed a road within the permit area before obtaining Division approval. The assessment officer assessed 23 penalty points for Co-op's degree of fault. Co-op did not contest the NOV, and paid the assessed penalty.

On April 26, 1991, the Division issued N91-20-1-1 to Co-op, alleging that Co-op had failed to update all of its maps within the time required by the Division. The assessment officer assessed 20 points for Co-op's degree of fault. Co-op filed an informal appeal, in which the Division upheld the fact of violation and the assessed penalty points. Co-op paid the assessed penalty.

On July 2, 1991, the Division issued N91-26-7-2(#2) to Co-op , alleging that Co-op had failed to obtain Division approval before enlarging a shop pad. The assessment officer assessed 25 penalty points for Co-op's degree of fault. Co-op timely mailed a Request for Hearing, but the Division did not receive it, so that the Request for Hearing was not timely filed. The Division refused to grant a hearing, and Co-op paid the assessed penalty.

By letter dated May 15, 1992, the Division Director notified Co-op that she had determined a potential pattern of violations existed at Bear Canyon Mine, and that the Division intended to ask the Board for an Order to Show Cause why Co-op's permit should not be suspended or revoked. The Director also stated that Co-op could request an informal hearing before the Division to review the potential pattern of violations, and specifically to prove that the violations were not caused by Co-op willfully or through an unwarranted failure to comply.

Co-op requested and the Division granted the informal hearing for the specific purpose of considering additional evidence on the issue of fault. Co-op offered, and the Division admitted and considered, Co-op's testimonial and other evidence in addition to the NOVs themselves, negating the degree of fault assigned by the assessing officer in the NOVs. Even though N91-20-1-1 was a final order assessing 20 penalty points for fault, the Director determined from the additional evidence that N91-20-1-1 did not constitute an willful or unwarranted failure to comply, and could not be considered to determine whether a pattern of violations existed. The Director then determined that a pattern of violations existed based solely on N91-35-1-1 and N91-26-7-2(#2), and recommended that the Board issue an Order to Show Cause and suspend Co-op's permit for forty-eight hours.

The Board issued an Order to Show Cause, and on October 28, 1992 held a preliminary hearing on the issue. At the hearing, the Division submitted the NOVs to support its finding of a potential pattern of violations. The Division withheld the additional evidence it had obtained and considered at the informal hearing which negated the assessed degree of Co-op's fault. At the objection of counsel for the Division, the Board refused to allow Co-op to offer any evidence of underlying facts as to its degree of fault. At the Board's request, Co-op and the Division submitted memoranda addressing whether Co-op was barred by collateral estoppel from offering evidence on the issue of Co-op's degree of fault.. The Board heard oral argument on the issue on January 8, 1993. On February 4, 1993, the Board issued an Order that Co-op is collaterally estopped from introducing evidence as to the degree of fault giving rise to N91-35-1-1 and N91-26-7-2(#2) in the Pattern of Violation hearing before the Board. Co-op requests that the Board reconsider that Order.

ARGUMENT

Administrative actions subject to *res judicata* are governed by the rules controlling the like effects of a court judgment. 2 AmJur 2d Administrative Law §500. In its Order, the Board correctly stated the four-part test adopted in Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978) to determine whether collateral estoppel, or issue preclusion, applies to bar parties from relitigating facts and issues in a subsequent suit that were fully litigated in an earlier suit:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?
>
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> **4. Was the issue in the first case competently, fully, and fairly litigated?**

For purposes of this Request for Reconsideration, Co-op does not dispute that the first three parts of the test are met. The Board's ruling on the fourth part of the test was as follows:

> Finally, we find that the issue of the degree of fault underlying the issuance of the NOV's was fully and fairly litigated in the first forum. Co-Op was served with the proposed penalty assessments by the Board's assessment officer. Those proposed penalty assessments contained the findings that Co-Op acted recklessly, knowingly, and intentionally by failing to seek and obtain the Division's approval before commencing construction activities at the Bear Canyon Mine. Co-Op had thirty days to appeal those findings either formally or informally. When Co-Op failed to appeal the assessment officer's findings, those findings became final orders of the Board and Co-Op waived its right to later contest those orders. See Utah Admin. R. 645-401-910. Co-Op's failure to exercise its appeal rights, cannot now prevent the preclusive effect of the Board's final order.[1]

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[1] R645-401-910 provides, "If the permittee fails to request a hearing as provided in R645-401-810, the proposed assessment will become a final order of the Board and the penalty assessed will become due and payable upon expiration of the time allowed to request a hearing."

[02-04-93 Order, p.14] The Board's ruling on the fourth test relies on the Board's finding that Co-op could have litigated the underlying facts of the NOVs but did not do so. Co-op requests that the Board reconsider its conclusion that the fourth part of the test was met.

1. COLLATERAL ESTOPPEL DOES NOT APPLY TO UNCONTESTED NOVs.

Utah courts rely on the Restatements as persuasive authority. The Restatement, Second, Judgments §27 restates the general rule governing issue preclusion:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

This is a restatement of the same general rule adopted by the Utah Supreme Court in Searle. Comment *e* to Section 27 states that collateral estoppel does not apply to judgments where the issues are not actually litigated, such as judgments by confession, consent or default:

> A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.
>
> . . .
>
> An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so; nor is it actually litigated if it is raised by a material allegation of a party's pleading but is admitted (explicitly or

by virtue of a failure to deny) in a responsive pleading; nor is it actually litigated if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial; nor is it actually litigated if it is the subject of a stipulation between the parties. . . .

In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action. [Emphasis added]

The Utah Supreme Court has at least implicitly adopted this rule as the controlling law in Utah:

> [I]t is important to keep in mind this distinction between the rule of res judicata and that of collateral estoppel: while as indicated above, the former applies both as to issues which were actually tried and those which could have been tried in a prior action, the latter does not apply to issues that merely "could have been tried" in the prior case, but operates only to issues which were actually asserted and tried in that case. [Emphasis added]

International Resources v. Dunfield, 599 P.2d 515, 517 (Utah 1979). Since judgments entered on default or pursuant to stipulation deal only with issues that could be tried but that are not actually tried, collateral estoppel does not apply to those types of judgments.

In Blaine County v. Bryson, 705 P.2d 1078, 1081 (Idaho App. 1985), Idaho expressly adopted Comment *e* to Section 27 as controlling law:

> We adopted the Second Restatement [of Judgments] in *Aldape v. Akins*, 105 Idaho 254, 688 P.2d 130 (Ct.App.1983). Section 27 of the Second Restatement sets forth the general rule of issue preclusion: [quotation omitted] . . . [T]he fact remains that the question of a public road was not "actually litigated" in that lawsuit. Rather, the suit was concluded with a negotiated settlement and the eventual judgment was entered with the consent of both parties. Comment *e* to section 27 of the Second Restatement [of Judgments] declares:
>
> > In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.
>
> Accordingly, we hold that the county is not precluded from asserting the existence of a public road across Parker's property.

In Chaney Bldg Co. v. City of Tucson, 716 P.2d 28, 30 (Ariz. 1986) the Arizona Supreme Court ruled that collateral estoppel did not apply to issues not actually litigated:

> [I]n the case of a judgment entered by confession, consent or default, none of the issues is actually litigated. . . . Because the issues involved in the Kulseth dispute were never actually litigated, one of the prerequisites to giving a judgment collateral estoppel effect is patently absent. Nothing is adjudicated between parties to a stipulated dismissal.

See also Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982) ("[A] default judgment is not a proper basis for collateral estoppel."); Abrams v. Interco Inc., 719 F.2d 23, 33 *note* 9 (2d Cir. 1983) ("[T]he decision of issues not actually litigated, e.g., a default judgment, has no preclusive effect in other litigation.");

Utah has a strong public policy favoring the settlement of disputes:

> The law has no interest in compelling all disputes to be resolved by litigation. One reason public policy favors the settlement of disputes by compromise is that this avoids the delay and the public and private expense of litigation. The policy in favor of settlements applies to controversies before regulatory agencies . . . .

Utah Dept. of Admin. Serv. v. Pub. Serv. Com'n, 658 P.2d 601,613 (Utah 1983). A rule applying collateral estoppel to uncontested NOVs would be in direct violation of this public policy:

> Collateral estoppel, in contrast to res judicata, applies only to issues that were directly litigated and not to those which merely could have been litigated. A fact established in prior litigation not by judicial resolution but by stipulation has not been "actually litigated" and thus is the proper subject of proof in subsequent proceedings. A contrary rule, commentators reason, would discourage parties from compromising and narrowing issues because of the possible future preclusive effect of their decisions. [Emphasis added]

United States v. Young, 804 F.2d 116, 118 (8th Cir. 1986):

In this cause, the Board found that Co-op could have challenged the assessment officer's proposed negligence points but, for reasons not in the record, Co-op did not do so. Co-op did not challenge the NOVs largely because a challenge would cost more in lost management time,

attorney fees and other litigation expenses than could be justified by the potential benefit of a reduction in the assessed penalty. The situation in this cause is analogous to a party allowing a civil judgment to be entered against him either by default or by stipulation, without litigating any issues. The underlying facts of the NOVs were never actually litigated. Under the rule stated in Comment *e* to Section, 27 and in International Resources v. Dunfield, 599 P.2d 515, 517 (Utah 1979), collateral estoppel does not apply in this situation. The fourth part of the Searle test is not met. Co-op requests that the Board reconsider its Order accordingly.

2. COLLATERAL ESTOPPEL DOES NOT APPLY WHERE THE BURDEN OF PROOF IN THE SECOND PROCEEDING SHIFTS IN THE PROPONENT'S FAVOR.

As shown in Point 1 above, collateral estoppel does not apply where the issues underlying the NOVs were not actually litigated. Even where issues are actually litigated, the law recognizes exceptions to collateral estoppel. The Restatement, Second, Judgments §28 states the following exception:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action . . . . [Emphasis added]

Comment *f* to Section 28 states in part:

> To apply issue preclusion in the cases described in Subsection (4) would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed. While there may be many occasions when such a holding would be correct, there are many others in which the allocation and weight of the burden of persuasion (or burden of proof, as it is called in many jurisdictions) are critical in determining who should prevail. Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied.

In State v. Jones, 750 P.2d 620, 623 (Wash. 1988), the Court ruled that where the state did not have the burden of proof on one proceeding but had a burden of proof beyond a reasonable doubt in a different proceeding, collateral estoppel did not apply in a second proceeding even to issues actually litigated before:

> This theory [collateral estoppel], however, applies only if the burdens of proof in the two proceedings are such that the determination in the first proceeding is actually conclusive of that in the second. [Quotation to §28(4) omitted]
>
> In SRA sentencing hearings, the State does not have the burden of proving the constitutional validity of a prior conviction. . . . However, in habitual criminal hearings, the State must prove the validity of prior guilty pleas beyond a reasonable doubt. Because the State's burden of proof was significantly higher in the habitual criminal proceeding, the determination there is not conclusive to the issue in the sentencing hearing. [Citations omitted]

State v Jones, 750 P.2d at 622-23.

In an uncontested NOV proceeding the Division has no burden of proof. In this cause at the formal hearing stage of a "pattern of violation" proceeding, the Division has the burden of proof by clear and convincing evidence. R645-400-335-100. Because of the disparate burdens of proof, collateral estoppel does not apply. See In re Braen, 900 F.2d 621, 624 (3d Cir. 1990) ("Braen argues that because Laganella bore a lesser burden of proof in the malicious prosecution suit than is required by § 523, collateral estoppel does not apply. . . . We agree that disparate burdens of proof foreclose application of the issue preclusion doctrine."); Hoskins v. Yanks, 931

F.2d 42, 42 *note* 1 (11th Cir. 1991) ("[T]his principle of collateral estoppel dealing with differences in the burden of persuasion must be included, if it was not impliedly before, in our list of collateral estoppel requirements . . . .")

The Division has no initial burden of proof at the NOV stage, or at most bears the initial burden of proof by a preponderance of the evidence. In contrast, a formal Board hearing on a "pattern of violation" charge imposes on the Division "the burden of establishing a prima facie case for suspension or revocation of the permit based upon clear and convincing evidence." R645-400-335.100. The Division's burden of proof in a "pattern of violation" formal hearing is significantly heavier than in a NOV proceeding. This is particularly true where, as here, Co-op did not contest the NOVs, so that the Division effectively had not burden of proof whatsoever. To apply collateral estoppel at the "pattern of violation" hearing based on the NOVs would be to rule, in effect, that the Division would have proved Co-op's fault by clear and convincing evidence at the NOV stage, even though the issue was not litigated and no evidence was even presented. "Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied." Restatement, Second, Judgments §28 Comment *f*. Co-op is entitled to the protection of the heavier burden of proof imposed on the Division by R645-400-335-100, which would be denied if the Board applied collateral estoppel based on the uncontested NOVs. The Board should require the Division to establish a prima facie case by clear and convincing evidence for each end every element for suspension of Co-op's permit, including the element of fault. Co-op requests that the Board reconsider its ruling in light of the Division's substantially higher burden of proof at this stage.

3. COLLATERAL ESTOPPEL DOES NOT APPLY WHERE THE POTENTIAL PENALTY TO THE PROPONENT SUBSTANTIALLY INCREASES IN THE SECOND PROCEEDING.

The Restatement, Second, Judgments §28 states another exception to collateral estoppel:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (5) There is a clear and convincing need for a new determination of the issue . . . (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. [Emphasis added]

Comment *j* to Section 28 states in part:

> In an action in which an issue is litigated and determined, . . . the amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair. . . . [W]hether or not relief from the first judgment may be obtained, the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding. [Emphasis added]

In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-331 (1979), the United States Supreme Court stated that collateral estoppel should not apply where because of disparate penalties a defendant has a greater incentive to litigate issues in a second action than he did in a prior action:

> A second argument against offensive use of collateral estoppel is that it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. The Evergreens v. Nunan, 141 F.2d 927, 929 (CA2); cf. Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (CA2) (application of offensive collateral estoppel denies where defendant did not appeal an adverse judgment awarding damages of $35,000 and defendant was later sued for over $7 million).
>
> . . .
>
> The general rule should be that in cases . . . where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would

> be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel. [Emphasis added]

See Yamaha Corp. v. United States, 961 F.2d 245, 254 (D.C.Cir. 1992):

> [P]reclusion in the second case must not work a basic unfairness to the party bound by the first determination. An example of such unfairness would be when the losing party clearly lacked any incentive to litigate the point in the first trial, but the stakes of the second trial are of a vastly greater magnitude. [Emphasis added]

See also Cohen v. Bucci, 905 F.2d 1111, 1112-13 (7th Cir. 1990):

> Inadequate incentive to litigate is an exception to non-mutual estoppel. Someone sued for a minimal amount will not put up the full defense justified in big-stakes cases, and it may be hard to anticipate that an issue in a pipsqueak of a case will have grave consequences later. Issues resolved after half-hearted efforts may be relitigated, when circumstances conduce to more accurate decisions.

See also Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1284 (9th Cir. 1986) ("When the amount in controversy in the first action is much less than the amount in controversy at the second, preclusion would be unfair.")

2 AmJr 2d Administrative Law §500 states in part:

> [I]n regard to some administrative determinations at least, there is reason and authority for holding that their conclusive effect is limited by the purpose for which they were made.

Under R645-401, negligence points are assigned to determine the amount of the penalty to be assessed, the maximum incremental penalty attributable to fault being $2,280.00. In contrast, a "pattern of violations" proceeding determines whether a permit should be suspended or revoked, the maximum penalty being the permanent revocation of a permit with potential losses in the hundreds of millions of dollars. Because the purpose and consequence of assessing negligence points under R645-402-323 is so disparate from the purpose and consequence of finding a

"willful or unwarranted failure to comply" under R645-400-330, the conclusive effect of the negligence points should be limited to the purpose for which they were made.

In Red Bluff Mines v. Indus. Com'n, 696 P.2d 1348, 1354 (Ariz.App. 1984), the Court held that collateral estoppel should not apply where the amount at issue is the first action was $1,000.00, but the amount at issue in the second action exceeded $24,000.00:

> [A]n exception to the application of issue preclusion is that if the party sought to be precluded did not have an incentive to obtain a full and fair adjudication in the initial action, preclusion will not be applied.
>
> As Comment j to Restatement § 28 points out, "the amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair." We believe that observation to be applicable here. By the terms of the November 2, 1981 award, Red Bluff's total liability appeared to be limited to $1,000.00. However, the amount in controversy in the second action may exceed $24,000.00. . . . Given all these circumstances, we conclude that issue preclusion should not bar Red Bluff from now having a full evidentiary hearing . . . .

See Ferris v. Hawkins, 660 P.2d 1256 (Ariz.App. 1983) (Collateral estoppel did not apply where the amount in controversy was $1,530.00 in the first action and $17,715.77 in the second action.)

In this cause, the assessing officer allocated 23 negligence points on NOV N91-35-1-1. Had Co-op contested the assessment, and succeeded in reducing the negligence points to 15 (the threshold for a potential Division "pattern of violations" finding), Co-op would have saved no more than $560.00. The assessing officer allocated 25 negligence points on NOV N91-26-7-2(#2). Had Co-op contested the assessment, and succeeded in reducing the negligence points to 15, Co-op would have saved no more than $800.00. In each case, the actual cost of contesting the assessments would have exceeded any potential savings. The amounts at issue were so small that Co-op had little or no incentive to vigorously litigate the issue of fault.

Co-op had no reason at the time to be concerned about a potential suspension of its permit. Not only had Co-op never before been threatened with a potential pattern of violations, there is no reported decision by any court or administrative body suspending a permit for a pattern of violations. The Division has an internal policy of never informing a permittee of a "potential pattern of violations" finding until after the permittee's time to appeal all underlying NOVs has already run. The Division followed its policy, and did not inform Co-op of a potential pattern of violations until after Co-op's time to appeal the underlying NOVs had already run.

In this cause, rather than fines based on fault of less than $1,000.00, Co-op now faces the suspension of its permit. Based on the Division's recommendation of a 48-hour suspension, the potential loss to Co-op is between $50,000.00 and $100,000.00. Co-op's employees face a potential loss of two day's wages and the opportunity to earn performance bonuses. Co-op also faces the impairment of its ability to meet its contracts. The amounts in controversy in the NOVs are so small in relation to the amount now in controversy that application of collateral estoppel would be plainly unfair. Therefore, Co-op requests that the Board reconsider its Order, and allow evidence as to the issue of Co-op's fault.

4. APPLYING COLLATERAL ESTOPPEL TO THE UNDERLYING FACTS OF A VIOLATION IN "PATTERN OF VIOLATION" HEARINGS IS AGAINST THE BOARD'S RULES, THE DIVISION'S POLICIES AND PRACTICES, AND PUBLIC POLICY.

In this cause, applying collateral estoppel would effectively preclude the Board and the Division from complying with their own rules and procedures regarding the determination of fault. R645-400-330 states:

> **331.** The Board will issue an order to a permittee requiring him or her to show cause why his or her permit and right to mine under the State Program should not be suspended or revoked, if the Board determines that a pattern of violations . . . exists or has existed, and that each violation was caused by the permittee willfully or through and unwarranted failure to comply with those requirements or conditions. A finding of unwarranted failure to comply will be based upon a demonstration of greater than ordinary negligence on the part of the permittee.
> **335.100** If the permittee files and answer to the show cause order and requests a hearing, a formal public hearing on the record will be conducted pursuant to the R641 Rules before the Board . . . . At such hearing the Division will have the burden of establishing a prima facie case for suspension or revocation of the permit based upon clear and convincing evidence. [Emphasis added]

R645-400-330 contemplates that the Board must make its own independent determination of a permittee's fault, and that the Division, as part of its prima facie case, must prove the permittee's fault by clear and convincing evidence.

The Division's internal policy prohibits the Division from considering any NOV as part of a potential pattern of violations unless the NOV has become a final order. [Division's Ex.7 ¶4, 5a] The Division's policy then provides:

> 6(b) The operator will be given an opportunity to request, within 30 days, an informal conference with the Division to discuss the "unwarranted or willful failure to comply" nature of the violations.
> 7(a) If the conference is not requested within 30 days, the Director will make a determination without benefit of a conference.
> 7(b) If the conference is held, the Director will consider information from the conference and make a determination as to whether a pattern of violations exists. [Emphasis added]

The Division's policy requires the Division, in a "pattern of violation" proceeding, to consider additional evidence offered by the permittee on the issue of fault. The Division actually considered additional evidence from Co-op in this cause! On April 26, 1991, the Division issued N91-20-1-1 to Co-op, which assessed 20 points for fault. Co-op filed an informal appeal, in

which the Division upheld the NOV. The Division Director later notified Co-op that she had determined that a potential pattern of violations existed. Co-op requested and was granted an informal conference before the Division for the specific purpose of presenting further evidence on the issue of fault. Co-op offered, and the Division admitted and considered, Co-op's evidence negating the degree of fault assigned by the assessing officer in the NOVs. The Director determined, based on evidence outside of NOV N91-20-1-1 that the NOV did not constitute a willful or unwarranted failure to comply. [Division's Ex.9 p.6] The Division has adopted an express written policy clearly stating that collateral estoppel does not apply to bar a permittee in a "pattern of violations" proceeding from offering evidence before the Division on the issue of the willfulness or unwarranted failure to comply nature of the underlying NOVs. Application of collateral estoppel based on the penalty points assessed in the final NOVs would require the Division to ignore its own procedural rules.

In State through Dept. of Community Affairs v. Utah Merit System Council, 614 P.2d 12159, 1263 (Utah 1980), the Council ignored its own procedural rules in excluding a party representative from its proceedings. The Utah Supreme Court stated:

> The Council cannot violate its own procedural rules by denying an appropriate agency representative access to the proceedings. Defendants contend that the procedural rules are merely "guidelines," but administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the agency to suit its own purposes. Such is the essence of arbitrary and capricious action. Without compelling grounds for not following its rules, an agency must be held to them.

Notwithstanding the general common-law rules governing collateral estoppel, the Division's internal policies, and the Board's rules, require both the Division and the Board, in a "pattern of violations" proceeding, to consider evidence of fault outside the NOVs themselves. The Division

actually did so in this cause. Its argument that collateral estoppel should apply to limit Co-op's evidence before the Board violates both the letter and the spirit of the Rules, the Division's policy, and the Division's actual practice in this cause. Because of the Division' policy, followed in this cause, any estoppel should act to bar the Division from objecting to Co-op offering evidence, not the other way around. The Board's failure to consider Co-op's evidence on the issue of fault would be reversible error. Utah Code Ann. §40-10-30(1)(a), (c)-(f).

The admissibility of evidence other than the NOVs themselves is underlined by the Division's reliance not only on the NOVs themselves, but also on an impermissible presumption in concluding that Co-op's failure to comply was willful and unwarranted. [Division's Ex. 9, Conclusion of Law No. 2] In In re MacFarlane, 350 P.2d 631, 633 (Utah 1960), a committee of the Utah State Bar relied on a presumption to find that an attorney had committed an ethical violation. The Utah Supreme Court ruled that reliance on the presumption was impermissible:

> [T]he trial committee in its report, adopted by two members of the Committee, indicated that it relied upon the presumption upon which the finding and judgment in that case was based. Whereas, respondent argues that the burden of proof in this proceeding is entirely different in that the presumption of undue influence which arises from the confidential relationship does not apply and that the persuasion of his misconduct must be by clear and convincing evidence. We agree that because of the seriousness of the consequences to the attorney involved touching upon the important right to follow his vocation and make a livelihood, that such is the established rule. [Emphasis added]
>
> . . .
>
> We are not concerned with the niceties of the term "presumption" but with a survey of the foundational facts and whether reasonable minds might regard the overall picture as meeting the required standard of proof . . . .

In this cause, suspending Co-op's permit has serious consequences to Co-op touching on the right of Co-op and its employees to follow their vocation and make a livelihood. The Division must prove every element of its case by clear and convincing evidence. A presumption is not

evidence, but merely assumes one fact from the existence of other proven facts. The Board should require the Division to meet its burden of proof by clear and convincing evidence rather than by an impermissible presumption on an essential element of the Division's case in chief.

The Restatement, Second, Judgments §28 states another exception, to collateral estoppel:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action . . .

Comment *h* to Section 28 states in part:

> There are many instances in which the nature of an action is such that the judgment will have a direct impact on those who are not themselves parties. For example, an agency of government may bring an action for the protection or relief of particular persons or of a broad segment of the public, or an individual may sue as representative of a class. In such cases, when a second action is brought, due consideration of the interests of persons not themselves before the court in the prior action may justify relitigation of an issue actually litigated and determined in that action.

Under the Division's policy, each and every uncontested NOV the Division relies on to support a "pattern of violations" finding will already be a final Order of the Board before the Division ever notifies the permittee of a potential pattern of violations. [Division's Ex.7 §6(b); R645-401-910] To avoid being arbitrary and capricious, any rule barring Co-op from introducing evidence on the issue of collateral estoppel in this cause must be generally applied to all permittees in all future "pattern of violations" proceedings. Such a rule would have a major impact on all permittees in the state, as well as other interested persons who are not parties to this action. In all likelihood, such a rule would also be invalid unless adopted pursuant to the

requirements of the Administrative Rulemaking Act. The Board should consider the interests of these others before adopting a rule applying collateral estoppel.

The Board should also give due consideration to its duty to develop an adequate record for purposes of appeal. As stated in Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4-5 (Utah App. 1991):

> An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review.
>
> > In order for us to meaningfully review the findings of the commission, the findings must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." [T]he failure of an agency to make adequate findings of fact in material issues renders its findings *"arbitrary and capricious"* unless the evidence is "clear, uncontroverted and capable of only one conclusion." [Citations omitted]
>
> The Utah Supreme Court has clearly described the detail required in administrative findings in order for findings to be deemed adequate.
>
> > [An administrative agency] cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that [an administrative agency] make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. *Without such findings, this Court cannot perform its duty of reviewing [an administrative agency's] order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.* [Emphasis added, italics in original]

In this cause, the record is inadequate for the Board to make findings of fact that will withstand judicial scrutiny under Adams. The record cannot be adequately developed unless Co-op is permitted to offer evidence of the underlying facts on the issue of Co-op' degree of fault.

The Board should allow sufficient evidence on this issue to enable the Board to meet its obligation to make findings "in sufficient detail that the critical subordinate factual issues are highlighted and resolved," Adams, above. Co-op requests that the Board should reconsider its ruling in light of its rules, the Division's policy, and public policy.

CONCLUSION

For the above reasons, Co-op respectfully requests that the Board reconsider its February 4, 1993 Order, and permit Co-op to offer evidence on the issue of the degree of Co-op's fault in NOV N91-35-1-1 and N91-26-7-2(#2).

DATED this 8 day of March, 1993.

Mark Hansen
Counsel for Co-op Mining Company

CERTIFICATE OF SERVICE

I certify that on March 8, 1993 I caused a true and correct copy of the foregoing Request for Reconsideration to be served by first class mail to the following:

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing JOINT MOTION TO DISMISS in Docket No. 92-041, Cause No. ACT/015/025 to be mailed by certified mail, postage prepaid, on the 10th day of March, 1993, to the following:

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